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ABSTRACT

Satellite news gathering (SNG) has been widely adopted in broadcast journalism in recent years, and appears likely to grow in importance as local television news operations increase their reliance on it. However, because the technology for SNG is so new, information transmitted through SNG systems is not adequately protected under current laws. Congress attempted to protect the interest of SNG originators in the Electronic Communications Privacy Act of 1986, which designated SNG transmissions as "private," but the Act provides only some protection in some situations. Moreover, it cannot be determined with precision which situations will trigger SNG protection under the Act and which will not. The best outlines for protection of SNG transmission appear to be in protection of intellectual property, though the law provides little guidance on the issue of detection and damages when an SNG feed is stolen. The 1986 Act is valuable in that it recognizes the interests of originators of SNG feeds, but is inadequate because it says nothing about the nature of satellite transmissions. Clearly, further congressional measures are warranted for the protection of such new technology. (JC)

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Mass Communication and Society Division

Satellite News Feeds: Protecting a Transient Interest

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Satellite News Feeds: Protecting a Transient Interest

ABSTRACT

Satellite news gathering (SNG) has been widely adopted in broadcast journalism in recent years. It appears likely to grow in importance, especially as local television news operations rely upon it more.

New methods of disseminating materials always raise issues about the rights of the creators of the materials. Congress has protected the interests of SNG originators in the Electronic Communications Privacy Act of 1986.

The paper examines the nature of the "rights" involved in satellite news gathering and distribution. It begins with an overview of the growth of SNG use in the industry. A close analysis of the 1986 Act is then provided to see if the congressional response meets the needs of the industry. The paper concludes that the Act does not appropriately answer the needs of the industry. Next, the paper compares interests in SNG materials to traditional interests in intellectual property. It is concluded that SNG materials are better viewed as a sort of intellectual property interest than as a privacy interest as found in the 1986 Act. The temporary nature of SNG materials, however, calls for a remedy that is different from tradition intellectual property remedies. It is finally concluded that Congress should start over to protect SNG materials under an intellectual property framework.

Satellite News Feeds: Protecting a Transient Interest

Introduction

New communication technologies of the latter 20th century have significantly enhanced consumers' access to information, programs and services. A growing body of research on consumer use of these technologies has explored social and economic impacts of the ongoing information revolution. Wegner has noted that new technologies have often become available before needed legal and policy directives were established.[1] Consequently, public and private concerns about new technologies relative to privacy, access and copyright have prompted administrative and legislative hearings. In the literature on new communication technologies, little attention has been devoted to analyzing the potential policy dilemmas faced by members of the private sector.

In some cases, the emerging communication technology has existed for decades, but a new and marketable application of the technology has enhanced its salience to both public and private sectors. Such has been the case with home video cassette recorders and cable television. However, the technological innovations which spawned both technologies again raised issues about access and copyright, among others. Consumer interests in the use of new communication technologies demand prompt attention; however, corporate interests also require scrutiny and redress.

As satellite technology has become less expensive, some local television stations are beginning to rely upon it for

covering national and international news. Satellite newsgathering technology (SNG) and satellite news services are giving a new meaning to the term "local news." Drummond observed that satellite technology has made the networks' status as sole distributors of world and national news broadcasts obsolete.[2] Again, the use of a new communication technology by the private sector appears to have leaped ahead of legal and policy directives needed to address access, copyright and property issues. This study attempted to analyze the legal and policy concerns related to the interception and use of a syndicated satellite news feed by an unauthorized rival network or local television station. The issues of copyright, property rights and unfair competition are scrutinized and discussed with respect to the problem posed.

Development and Growth of Satellite Newsgathering

New communication technologies are continuing to increase and improve the ability of commercial television to cover and report news of the day. In the 1970's the advent of the minicam launched local television news organizations into an era of electronic newsgathering. Later technological advancements in microwave technology further enhanced the ability of local stations to cover news events beyond individual markets and to report such events live. In the 1980's, the advent of satellite newsgathering has again revolutionized electronic journalism. Yoakam and Cremer observed that the use of satellites has

prompted local television stations to show how events in other areas of the country impact on the local community.[3] The authors also noted that the use of satellite technology gives local stations some "competitive advantage" in reporting news within their respective markets.

The advent of Ku-band satellite technology has enhanced the use of satellites for sending and receiving regional, national and international news. The Ku-band lies between 12 and 14 gigahertz (GHZ) on the radio spectrum, and is almost the highest portion of the spectrum used commercially.[4] The Ku-band permits the use of a smaller and more portable antenna dish for satellite newsgathering. Consequently, Ku-band uplinks and downlinks are becoming more commonplace in the top 50 broadcast markets. While satellite newsgathering is being practiced regularly in the nation's largest broadcast markets, smaller market stations in various regions of the country have invested in the new technology.

Concerns and questions about future trends in the use of satellite news technology and satellite news services were the focus of panel discussions at the 1986 International Convention of the Radio Television News Directors Association. Additional concerns about the impact of SNG on network news offerings have been largely speculative and widely reported in the trade press. Meanwhile, relatively little systematic research has been devoted to patterns of SNG use by stations employing K-u band technology. The small amount of published research on the adoption of K-u

band technology for newsgathering suggests that local television stations in both large and medium markets are investing in this new technology.

Smith found that in the 30 largest broadcast markets, most network affiliates used satellite downlinks and helicopters for local news production.[5] However, he found that over a third of stations in smaller markets used satellite downlinks, news helicopters and/or permanent out-of-town news bureaus. In a random survey of news directors in the top 50 broadcast markets, Broholm found that stations using portable uplinks were somewhat more likely than other stations to travel outside of their ADI's to cover stories.[6] He also noted that 93 percent of news directors surveyed agreed with the statement:

> "Using satellites for newsgathering gives a station a competitive edge over stations that don't."

The commercial networks, realizing the revolutionary impact of portable satellite technology, have devised programs for helping local affiliates purchase K-u trucks and antennas. In assessing industry reaction to the adoption of K-u band technology for newsgathering, Standish observed that "satellite technology is here to stay."[7] She noted that some stations are marrying SNG and ENG technologies to get more use out of their investments, and she predicted that by the end of 1987, approximately 300 satellite news vehicles will be in operation in the U.S. The cost of a satellite news vehicle ranges from

$200,000 to $500,000 depending on the size of the vehicle and the choice of optional equipment.[8]

The president of Hubbard Broadcasting and founder of CONUS, Stanley S. Hubbard, recently assessed SNG's impact thusly:

> "There's no doubt in my mind that this is the future of local news broadcasting."[9]

As K-u band technology becomes more refined, more portable and more affordable, satellite newsgathering promises to become widely used by local television stations as well as commercial and cable television networks. The unauthorized access to satellite transmitted news raises many questions which pertain to the economic and competitive interests of news organizations. The U.S. Congress has recognized the need for policy direction and has responded by recently adopting the Electronic Communications Privacy Act. But does this new law adequately respond to concerns of commercial broadcasters regarding the unauthorized use of syndicated satellite news transmissions?

Electronic Communications Privacy Act of 1986

A law that would protect against widespread unauthorized interception of satellite transmissions went into effect October 21, 1986. The Electronic Communications Privacy Act makes it illegal to intentionally intercept, use, or divulge the contents of any wire, oral, or electronic communication. Electronic communication is a newly defined term covering "any transfer of signs, signals, writing, images, sounds, data, or intelligence of

any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photooptical system that affects interstate or foreign commerce..."[10]

The act is a rewrite of the 1968 federal wiretap law, aimed at protecting the new communications technologies, primarily electronic mail, cellular telephone conversations, paging devices, and other radio and computer transmissions. A small part of the act is concerned with satellite transmissions and the interception of broadcast feeds.

The act prohibits interception of communications that are not "readily accessible" to the public and makes it illegal to intercept communications for commercial or private financial gain. Television networks, in particular, have considered the act a victory in specifically gaining protection against satellite dish owners intercepting news and sports feeds for purposes other than private use.[11]

The act somewhat echoes the already existing law in Section 705 of the Communications Act of 1934.[12] Section 705 covers the unauthorized use of communications and provides, in part, that:

> No person having received any intercepted radio communications or having been acquainted with the contents....shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.[13]

The meaningful differences between the provisions of the two acts and, hence, the purpose of the recent enactment is unclear.

The courts have been the primary interpreters of Section 705, but no cases have been brought specifically concerning any interception of satellite feeds. How the courts will respond to potential cases and interpret Section 705 and now the Electronic Communications Privacy Act is uncertain. The addition of the new act still leaves open many questions.

First of all, the act seems to cover all satellite communications; however, there are some exemptions. The Electronic Communications Privacy Act does not protect any electronic communication that is otherwise "readily accessible" to the general public.[14] Unfortunately these services were purposefully left undefined.[15] The report states that amateur radio communications, for example, would be exempt.[16] The act even excludes cordless telephones because they use low frequencies that can be easily intercepted, often by accident.[17] There is also no expectation of privacy. Would SNG feeds be considered "readily accessible?" While the general public may not be capable of receiving the Ku band SNG transmissions, certainly other television stations would be capable. Is there a reasonable expectation of privacy when a station transmits an SNG feed? It will be up to the courts to interpret "readily accessible," "general public," and what an expectation of privacy would be in the context of SNG use.

The Electronic Communications Privacy Act also exempts the reception of certain unscrambled satellite transmissions. Section 2511 (4) (c) specifically states:

> Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted to a broadcasting station for purposes of retransmission to the general public is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.[18]

Thus, on its face, the act does not prohibit private reception of feeds that would later be aired by a broadcast station. This would seemingly include satellite news gathering feeds by individual stations. Whether or not the exact contents of a feed must be ultimately aired, however, is left to interpretation.

Yet the exemption is interpreted in the report as not applying to "the interception of private communications via satellite such as sporting events when they are not the final output of a national television network..."[19] "The exemption does not extend beyond 'network feeds'."[20] The purpose of the exemption was to remain neutral to the interception of such signals by home satellite dish owners.[21] Will the courts refer to this legislative history or to the exact wording of the act?

Even so, the act does not authorize this limited interception. The report states that the "legality of noncommercial interception of this type of unscrambled satellite transmission will be decided under Section 705 of the Communications Act."[22] Section 705 of the Communications Act seems to deem this interception illegal. It exempts "communication which is transmitted by any station for the use of the general public," but explicitly states that this "relates to

ships, aircraft, vehicles or persons in distress, or which is transmitted by an amateur radio station operator or by a citizen band radio operator."[23] Section 705 does exempt the private reception of certain satellite cable programming,[24] but this would not apply to network feeds to affiliates or to SNG feeds which are at issue here.

How should this be interpreted? The new act remains neutral with respect to the coverage of Section 705. The Communications Act appears to be the final determinant of what is ultimately permissible. So is this new law really a meaningful victory for broadcasting?

Despite any judicial consideration the Electronic Communications Privacy Act may be given, certain practical problems nonetheless arise. Perhaps most fundamental is that the law is almost impossible to enforce. How might violators be caught? Because of the nature of radio waves, an SNG feed may be easily picked up by many unauthorized receivers, without the sender's knowledge. Even if another broadcast station steals the signal and airs it, how might the sender know without an extensive monitoring system of all broadcast station newscasts?

What exactly becomes an unauthorized "use" of the contents is a problem of definition. To willfully use or endeavor to use the contents of any electronic communication is an act punishable by a fine or imprisonment.[25] Furthermore, the sender may recover damages in a civil action.[26] Yet is a "use" only a direct retransmission of the intercepted feed? What if the story is re-

edited or the interceptor merely plucks out specific information? What if the transmission is simply observed in an attempt to steal a scoop or stay on top of the competition? It may also be argued that the material had necessary news value and was "used" without regard to any financial gain. A "use" may certainly be difficult to detect and prove.

Finally, it appears that for an SNG feed to be protected under the Electronic Communications Privacy Act, it must be scrambled or encrypted so as not to be readily accessible.[27] Some cable networks are scrambling programming, and even the broadcast networks are considering scrambling their feeds. Yet scrambling programming is costly, and this particularly becomes an issue for medium and small market stations wishing to engage in their own satellite news gathering operations. Securing adequate protection of feeds may be cost prohibitive and deter stations from fully using and thus benefitting from the available SNG technology. Must this infringe on the rights of these stations to communicate freely?

The Electronic Communications Privacy Act may appear encouraging. However, it is confusing and particularly inadequate for protection of SNG transmissions. One may assume the act would clarify what must be apparently inadequate provisions of the Communications Act. Yet it is questionable as to why the particular provisions of the Electronic Communications Act are even needed when the act refrains from amending the Communications Act.

Furthermore, a privacy approach to handling potential interception problems may not be best or even sufficient. The Electronic Communications Privacy Act only amends the wiretap law and does not address such issues as the copyright implications of illegal satellite reception. Issues of property rights or unfair competition, for example, are not covered by either act. These issues may soon face the courts.

Legal Protection for SNG

American law has always sought to protect the creators or proprietors of creative or communicative materials. And since the inclusion of the copyright and patent clauses in the U.S. Constitution, the law has fallen behind technology in providing that protection.[28]

The various branches of "intellectual property" law have been the traditional means of protecting interests in creative output. Although copyright and patent laws are the most familiar, a host of legal doctrines fall within the parameters of intellectual property.[29] Whatever the legal doctrine involved, however, intellectual property has at bottom two primary interests. The first interest is to provide formal encouragement to those who would create materials. Without the intellectual property right to control the uses to which material is put, it is argued, the creator may choose to forego creative effort.[30] The second interest is closely tied to the first. One way or another, intellectual property law attempts to protect the value

of a creator's efforts by providing damages payable to creators and/or by punishing offenders with fines or imprisonment.[31]

The present uncertain status of Satellite News Gathering has many precedents. For example, holders of copyright in popular recordings fought for many years to achieve protection against the use of those recordings by radio broadcasters.[32] Traditionally, the copyright statute prevented uses of the "work" itself only, not of an electromagnetic recreation of the work. The distinction between a work and a transmission is one that continues to haunt the law.[33]

It has long been argued whether or not an intellectual property interest is a real property interest. American law, and therefore American judges, steeped in the common law tradition, are much more comfortable with property that may be picked up by hand, or locked up, or consumed.[34] The conflict is perhaps better viewed not as whether or not creative material is the sort of thing we consider property, but whether or not creative material is the sort of thing that calls for legal protection.[35]

In other words, trying to decide whether a news organization's satellite feed is property that may be controlled, or strictly some type of personal right,[36] is the result of asking the wrong question. The Electronic Communications Privacy Act of 1986 makes precisely that mistake; it attempts to protect the satellite dissemination interests of news organizations--along with a host of other interests of other groups--without attempting to define or come to terms with what SNG is. One

result of not addressing the SNG issue directly is that, as discussed in Section 2, the statute does not adequately protect the broadcaster's interest in the material transmitted. Another result is that SNG protection has been codified in a statute that has privacy as its primary concern, an especially ironic twist considering that exclusivity is the broadcasters' concern, not privacy.[37] News material sent by satellite, by definition, is intended for the broadest public dissemination. No traditional privacy interest is implicated.

Given the philosophical anomalies of the 1986 Act, it comes as no surprise that the remedy provisions are correspondingly off-point. If it is axiomatic in law that there can be no right without a remedy, it is equally true that there can be no good remedy for an ill-defined right.[38]

The authors suggest that legal analysis of the issues involved in SNG must start at the beginning--that is, with an examination of the nature of the materials involved. Once the nature of the materials is clear, it must be determined if they are the sorts of materials society wishes to encourage and grant exclusive control over. After assessing the nature of the materials, the various parties with interests in SNG should be examined. News organizations and audience members should be the primary parties concerned with SNG protection. The interests of competitors of originating news organizations must be considered, however. Finally, if the foregoing indicates that some type of protection is desirable, the question of remedies should be

addressed. The remedy should be contoured to match the needs of both SNG message originators and of audience members. It must be able to actually protect the interests involved.

The following analysis draws from various areas of intellectual property. Analogies drawn from each should prove instructive in determining the nature of SNG transmissions and in creation of a workable remedy. This analysis is not, however, an attempt to draft legislation. Its concern is instead with outlining the points that Congress should consider in legislating SNG and similar rights.

Nature of SNG Transmissions

For purposes of this paper, the scope of SNG transmissions is limited to those that contain news reports. Other uses, such as entertainment or advertising transmissions, may be addressed similarly, but the authors' concern is with broadcast journalism, where competition tends to be the greatest and the urge to use another's material may consequently be greater.

What occurs when a news feed is sent by satellite is no mystery. A signal is sent from an uplink station at the origination point. It then is bounced from, and perhaps otherwise affected by, a geosynchronous satellite. Finally, the signal is received at its destination, a downlink station. Typically, the downlink receiver is either an affiliate or contracted syndicator[39] who has paid in one way or another for the right to receive and use the material contained within the signal. The opportunity to intercept the signal occurs when an

unauthorized downlink station is able to receive the signal. Typically, the unauthorized downlink will be operated by an organization which competes with the originator of the signal, the authorized receiver of the signal, or both.

It is assumed here that, eventually, a formal dispute between competitors will be brought to an American court. This dispute becomes more likely as more local stations rely on remote satellite feeds for local, regional, national, and international news. For example, the leader of a country in Asia is wounded in an assassination attempt. The only television news crew in the area works for the XYZ syndicate, so naturally only XYZ has a report. The report is sent via satellite to XYZ licensees around the world. One of those licensees is a VHF station in a medium size U.S. city. Another VHF station in the same city intercepts the signal, and runs the report before the licensee does because its evening newscast is at an earlier time. In this scenario, XYZ might claim harm. The licensed VHF station might claim harm. Either or both might take the interceptor to court. What would happen under present conditions?

The result at present would present a herculean job for the trial court initially asked to settle the dispute.

As was demonstrated in Section II, even Congress ducked the key question of defining what SNG disseminations are when it passed the Electronic Communications Privacy Act of 1986. It merely said that unauthorized receivers were not supposed to intercept signals from satellite feeds. It did not stipulate

what was being stolen. What is stolen is a key factor in deciding how to protect it from being stolen in the first place.

What is stolen when an SNG feed is intercepted is an electromagnetic signal. Although the Act implies that encryption of a signal may render it "private" and therefore more protected,[40] encryption does not change its electromagnetic nature. And any student of broadcast and cable knows that encryption systems face early and inevitable defeat.[41] The feed, then, is intangible by human senses. Only the correct equipment renders it meaningful, encrypted or not. Its intangibility seems to be the major impediment in deciding what to do in the law about SNG feeds. It is a form of dissemination that is inherently difficult to control and easy to intercept.

An intangible interest that is easy for others to appropriate is not a new phenomenon in the law. The law of unfair competition, trademarks and service marks exists precisely to protect intangible interests. Perhaps valuable comparisons to SNG may be made.

Unfair competition has been charged in many court cases involving news.[42] All the cases affirm the notion that a competitor may not take the product of another. In the precedent setting International News Service case,[43] William Randolph Hearst's INS took Associated Press news reports on the war in Europe directly from AP's news blackboards in Manhattan, then transmitted the reports via its own telegraph system to western Hearst papers before AP members received the reports, giving INS

a competitive advantage. The Supreme Court declared it an unfair one. The INS situation is identical to the XYZ example given earlier, but for the technology involved. The key considerations under unfair competition when news is at issue are: 1) was the material taken of value?; 2) did the taking of the material result in an otherwise unavailable competitive benefit to the taker?[44] Whether or not the taker intended to specifically harm the competitor whose material was taken was discussed, but was not determinative.[45]

In news, the value is often in the effort it takes to get a report, not in any 'market' value of the material. The very fact that a competitor takes the work of another is evidence of its value. Whether in newspaper or television news, the 'market' value is reflected if at all in longterm circulation or rating figures, which would be of little value in determining interests in SNG feeds.[46]

Trademark and service mark law operates in a similar fashion to protect a wholly intangible interest. But the rationale for the law differs from that of unfair competition. While unfair competition is concerned primarily with the behavior of competitors in the economic marketplace, trademark is concerned primarily with the behavior of consumers. A trademark or service mark becomes eligible for legal protection when it means something distinctive to consumers.[47] As a result, the name Coca-Cola becomes exclusive to that company to assure the consumer that the beverage bought is the real thing.[48] That the

company has spent a great deal of time, effort, and money to get consumers to accept the name is a peripheral factor. The trademark must become identified with the product, regardless of the marketing effort.[49]

What the two areas--unfair competition and trademark--have in common, then, is prevention of dishonest use. Only originators retain exclusive interests in a name, idea, or report. In the typical business setting, however, a business will readily discover interfering uses. A beverage called "Koke" will necessarily appear on store shelves, and a verbatim re-use of a wire service story will necessarily be seen by many people. SNG feeds, when intercepted, may not be as readily discoverable. An interceptor may, for example, edit out references to a network or syndicate. Interceptors might use only the video portion of the signal, substituting their own text, or reading another's text with staff. That ferreting out SNG thefts will be more difficult than spotting trademark infringement or unfair copying is unfortunate. But it does not change the basic nature of this intangible material.

Another analogous area of law sometimes referred to is copyright. Under American copyright law, only "works" and not ideas are eligible for protection.[50] That television broadcasts may be copyrighted has been long-established. That television broadcasts benefit but little from that protection is also clear.[51] It has consistently been decided that news itself may not be copyrighted, but that accounts of news may be.[52] That is

little comfort for an originator, since a report may not be used as is, but the idea may well be used to generate a story by a competitor--who otherwise would not even have the idea.

The amendment to the copyright law to protect computer programs appears to address concerns much like those in SNG.[53] Although computer disks or tapes contain material that is "tangible" enough to be considered a "work" under the copyright act,[54] the essentially intangible nature of the encoded material remains. It is too early to decide if the amendment has adequately served the interests of those who create computer programs.[55] The amendment did not change the remedy provisions of the act, however. Since unauthorized use of computer programs is easy to accomplish and difficult to discover, this makes the new protection much less effective.[56]

There can be no doubt that satellite-delivered news is the sort of material that society wishes to encourage. It has encouraged gathering and dissemination of news in numerous ways for many years.[57] And it is logical that the only way to properly encourage development of SNG is by attempting to grant originators the exclusive use and control of the materials. That is the message of all areas of American intellectual property law. The underlying basis, however, for a grant of exclusivity is that the public will benefit--be it from more news, or from more valuable consumer information, or from more inventions and books.[58]

It has not hindered the development of protection for these

intangible interests that they were intangible. The choice of a "property" or "tangibility" requirement for protection is simply beside the point. The choice of the 1986 Act to roughly construe SNG and other electromagnetic transmissions as matters of "privacy" is, therefore, inapposite. To the extent that the Act protects private conversations and in-house business communications from interception by government agencies or others[59] it serves a genuine privacy interest. But since those interceptions would not normally be for the purpose of using another's work product, the grouping with SNG is awkward at best. Since SNG is and will be used by disseminators that are mass rather than private media, a solution that meets the needs of mass media is called for.

Interests in SNG Transmissions

Since it is clear that SNG reports are precisely the sort of materials that society wishes to encourage, it becomes important to consider who will benefit and who will not if SNG reports are protected. It is here that the 1986 Act is at its most schizophrenic. The Act attempts to simultaneously exempt interceptions that do no commercial harm while punishing those made with the intent to do so.[60] Generally, intellectual property protection provides for exclusivity--any allowable uses are made via defenses to use rather than exemption to use. The distinction is especially critical; traditional intellectual property relies upon market players to police competing uses.[61] The 1986 Act, by contrast, attempts to criminalize interception

of satellite feeds, thereby necessitating the exemption based on "intent."[82]

Had Congress considered the types of different interests at work in the SNG context, perhaps it would have reached a solution more likely to work. The problem of interception is one that occurs among competitors; there is little basis for, and little hope for success, in relying on government-based prosecutions to stem SNG thefts.

There are essentially three interests at stake in SNG signals. The first is the interest of the originator and the originator's authorized users. Theirs is a commercial interest primarily--a desire to protect the competitive value of news reports. The value, not control over who sees the report, is what originators want the full benefit of. Originators such as the major national networks will naturally hope that all viewers see their reports. To originators, the only way to assure that the benefit of value is received is through exclusive control, and exclusive control has traditionally been provided by excluding all others. In return for this exclusivity, it is assumed that originators will be even more motivated to generate SNG reports.

Competitors have interests too. News organizations other than originators have an interest in pursuing the same news reports as originators. That interest is reflected in the rule that news itself is uncopyrightable. And sometimes, a competitor's interest in duplicating an originator's material

will be so great that an exact use is excused.[63] Copyright's doctrine of "fair use" holds that copyrighted material may be used so long as it serves a greater public purpose,[64] but only so long as the use does not materially affect the copyright holder's market value in the material.[65] Most of the time, however, competitors have virtually no right to use another's material. The burden of proof in fair use is on the user, and a competitor whose use affects market value cannot be said to have used fairly. Of course, as a practical matter, competitors will routinely monitor SNG feeds, using them for story ideas and tips of their own. That the 1986 Act technically makes this punishable is regrettable. Surely a competitor who technically 'steals' another's story idea has the "intent" to profit anticipated by the Act,[66] but that is not at all like causing financial harm by usurpation, as in the unfair competition or trademark context. Routine monitoring of SNG feeds by competitors, however, will be triply difficult for originators to spot in the first place. A law that punishes that which cannot be detected is weak protection, for both the originators, who cannot use the Act effectively, and for competitors, who cannot predict what will be punished, or when.

In the middle is the general public, all of them potential viewers of SNG reports. The public has two interests here. First, it must be assumed that the public wishes to have more rather than less total news product to choose from. Few principles are stronger in communication law than that a variety

of voices and sources is preferred.[67] The public does not care, however, who profits. It only wants more news product. How news product is encouraged is a matter of indifference, so long as the method works.

The public's second interest, recognized in both trademark and unfair competition law--and to a lesser extent in copyright or patent law[68]--is that the material received be genuine. It may make a difference to an audience member that a report comes from ABC or XYZ, for example. In the event that an SNG report has been edited so as to obscure the originator, the audience is deprived of knowledge that may be critical in accepting the report. The reputation of the news organization is important to the audience. Paralleling this interest is the originator's interest in getting credit for what it has produced. A traditional intellectual property model recognizes and gives strength to this interest, but it relies on actions brought by competitors, not by members of the public or the government, for its effectuation.[69]

There may be a third interest that concerns the public in SNG. Technology makes it possible for audience members to directly intercept programming. No member of the public wishes to be punished for doing so. Congress recognizes this interest by placing an "intent" to profit test into the 1986 Act, exempting other uses.[70] It is unlikely that the public will be charged under this section, but the vagueness of "indirect commercial advantage or private financial gain" may certainly

allow a court action. For example, a homeowner may be in a cable service area, but use a satellite antenna instead, thereby enjoying "private financial gain" at the expense of the cable operator and its licensors.[71] However direct use by the public is viewed, it does not appear to be the kind of harm that is the traditional province of intellectual property. An isolated use by private receivers will not cause harm to market value; aggregated, however, a pattern of private interception may cause loss of value. There is little remedy for this, though, short of employing some type of electromagnetic police.[72]

In weighing the competing interests in SNG, it is obvious that those of originators and of the public are paramount. The interests of competitors are peripheral and pose no impediment to putting in place strong legal protection for the materials of originators.

A Remedy That Works

Normally a statutory remedy for a protected interest is crafted with an eye on the nature of the interest and the likely difficulty of protecting it. Remedies have not been a problem in print-oriented intellectual property, where infringing uses are obvious and easy to detect. It is no surprise, then, that remedies in the areas of copyright, trademark, and unfair competition are tied closely to the perceived market value of the thing used.[73] A remedy for SNG theft must take into account the evanescent nature of SNG signals and the difficulty of detecting SNG thefts.

Unfortunately, the Electronic Communications Privacy Act of 1986 is a rewrite of federal wiretapping law, with SNG transmissions a minimal concern. The Act's two remedy sections relevant to this study, sections 2511(4) and 2520, are either too strict with interceptors or too lenient. Section 2511(4) provides for criminal punishment in fines and/or imprisonment. That is hardly an effective way of policing a competitive wrong. Section 2520, by contrast, allows civil damages to originators. The primary measure of damages is "the sum of the actual damages suffered...and any profits made by the violator." That is essentially the same as damages available in traditional intellectual property actions. The section also allows for equitable relief, such as injunctions, which will be of little use in the SNG context. A court simply cannot order an injunction against behaviors that cannot be predicted--and no one can tell which SNG feeds will have appeal to competitors. An injunction barring all future interceptions would be too broad.[74] Section 2520 provides an alternative measure of damages--$100 a day or $10,000, whichever is greater.

This plan overlooks the inevitable complexity of potential litigation. For example, how is "actual damage" to be measured? In traditional intellectual property, parties considered the effect of an infringing use upon sales,[75] or some other tangible measure. The market value of an SNG feed will be harder to fix. Courts may find themselves using inapposite analogies in determining damages.

The criminal penalties also overlook the context. They are so harsh that they may prevent uses that would otherwise be considered "fair" uses. It is of course doubtful that government will prosecute this essentially private action.

It may be that $100 a day would become the norm in SNG cases. Judges are not eager to impose harsh penalties for minor offenses; for minor uses, the courts may be tempted to either declare the use "exempt" or apply the $100 a day rate, rather than impose damages out of all proportion to the wrongs involved.[76] Competitors might consider an occasional $100 a day penalty a reasonable cost of doing business, and the Act would not effectively deter what it was most intended to deter.

Congress was not without models for remedies in areas where violations are hard to detect. Congress is the author of many. One good example is the treble damages provision in antitrust law. A plaintiff in an antitrust suit may obtain treble damages when the violator's actions were planned and caused significant commercial harm.[77] Another example is in the penalties for insider trading under the securities laws. The insider is notoriously difficult to smoke out; therefore the penalties for insider trading are elevated.[78] It is not suggested that treble damages is the only way to effectuate originators' interests in SNG feeds, but treble damages provides a model that more closely fits the nature of SNG than does the remedy portion of the 1986 Act.

Any statutory remedy should plainly state what is not

allowed and what is allowed. If there are uses that will be considered analogous to "fair use" in copyright, they should be spelt out. The 1986 Act forces the reader to cross-refer to many other sections and, ultimately, to the Federal Communications Act of 1934, just to determine what is allowed. If a fair use approach is explicitly adopted for SNG and other electromagnetic materials, it is anticipated that the defense will not be as broad as it has been for print material. With SNG feeds, the nature of the "work" indicates that partial uses will be difficult, and that even partial uses are more likely to cause market harm than partial uses of print materials.

The 1986 Act requires an intent to profit on the part of an interceptor for an originator to prevail. As noted earlier, intellectual property is concerned with assuring profit to rightful originators. The motives of the infringer are not relevant, except to the e[illegible]nt that motive occasionally makes infringement itself easier to prove in court.[79] The best test, then, is one tied to market harm caused rather than one tied to intent to cause market harm. This assures that originators get the value of material produced, thereby encouraging production.

The remedy portion of any protected interest is critical. The protection is only as good as the remedy provided. And an apt remedy is needed at the earliest opportunity. For example, in an analogous area of intangible interest, the "right of publicity" has developed strictly as a matter of common law in some courts, as a matter of statutory law in others, and it has

conflicted in all.[80] The need for attention to protection for SNG is now. Congress is the proper legislative entity, given the interstate and international nature of SNG; the protection of SNG material is well within Congressional authority under the Constitution's commerce clause.[81] A uniform, good remedy is a federal matter.

CONCLUSION

This paper has traced the rapid deployment of SNG technology in the television news business. SNG promises to change the nature of television news. It is increasing both competition and diversity of news sources. It has done so so far in an environment wherein competitors have relied almost exclusively on market forces to plan. Government has not been a major player, except to the extent that the FCC plays a traffic coprole in determining satellite usage.

Recently Congress has filled the regulatory and statutory void with the Electronic Communications Privacy Act of 1986. This paper has looked at the most pertinent provisions of that Act to see how well or how poorly the Act fares in providing protection against unauthorized interception of SNG feeds. We have concluded that the Act may provide some protection, in some situations, but little or no protection in others. And it cannot be determined with precision which situations will trigger SNG protection under the Act and which will not.

Given the growing importance of SNG reports in the daily lives of Americans, it is imperative that this material be protected in a way that serves the public best. The 1986 Act's method of designating SNG transmissions as "private" cannot serve the public best. Another method of protection is needed.

The best outlines for protection are found in long-established areas of law, not in new doctrines specially devised for this technology. The intellectual law doctrines of unfair competition, trademark, and copyright, have adapted to new technology in the past. The principles of intellectual property law appear to adapt well to SNG protection. Intellectual property provides little guidance, however, on the issues of detection and damages when an SNG feed is stolen. Other models, drawn from competitive business wrongs such as antitrust, seem more likely to address the interests of the originators of SNG feeds.

The 1986 Act is valuable in that it recognizes the interests of originators in SNG feeds. It is inadequate, however, for a variety of reasons. It simply does not say anything about the nature of satellite transmissions. Its remedy provisions are more fitted to the wiretapping prohibitions that occupy most of the Act. It is not an act to protect SNG. It is just a way station on the road to appropriate protection.

Notes

[1]John M. Wegner, "Home Interactive Media: An Analysis of Potential Abuses of Privacy," Journal of Broadcasting & Electronic Media, 29:51-63 (Winter 1985).

[2]William J. Drummond, "Is Time Running Out For Network News?" Columbia Journalism Review, V. 25, No. 1, pp. 51-52 (May/June 1986).

[3]Richard D. Yoakam and Charles F. Cremer, ENG: Television News and the New Technology, New York: Random House, 1985, p. 314.

[4]Martin Mayer, "Here Comes Ku-band," Forbes, p. 66 (May 21, 1984).

[5]Conrad Smith, "Newsgathering Technology and the Content of Local Television News," Journal of Broadcasting, 28: 99-102 (Winter 1984).

[6]John Broholm, "SNG Research," RTNDA Communicator, V. 39, No. 11, pp. 26-27 (November 1985).

[7]Kim Standish, "Satellite News Gathering: The Next Round," RTNDA Communicator, V. 40, No. 9, p. 37 (September 1986).

[8]Brian McKernan, "Star Trucks," Broadcast Management/Engineering, V. 23, No. 1, p. 20 (January 1987).

[9]Standish.

[10]Electronic Communications Privacy Act of 1986, § 2510(12).

[11]"House Subcommittee Passes Bill Protecting Networks Against Illegal Use of Feeds;" Broadcasting, May 19, 1986, p. 50.

[12]47 U.S.C. § 705 (1934).

[13]Ibid.

[14]Electronic Communications Privacy Act, § 2511(2)(g). This says "It shall not be unlawful under this chapter or chapter 121 of this title for any person -- (i) to intercept or access an electronic communication system that is configured so that such electronic communication is readily accessible to the general public."

[15]H.R. Report No. 99-647, 99th Cong., 2d Sess. 42 (1986). This reads: "The Committee considered listing all the existing radio services which are exempt from the bar on interceptions, but rejected that approach because it would have been cumbersome, possibly redundant, and would have had a built-in obsolescence."

[16]Ibid.

[17]Electronic Communications Privacy Act, § 2510(1); H.R. Report No. 99-647, 99th Cong., 2d Sess. 33 (1986). "Because the communications made on some cordless telephones can easily be intercepted with readily available technologies (such as AM radio), it would be inappropriate to make such interception a criminal offense."

[18]Electronic Communications Privacy Act, § 2511(4)(c).

[19]H.R. Report No. 99-647, 99th Cong., 2d Sess. 43 (1986).

[20]Ibid., p. 47.

[21] Broadcasting, op. cit. "Subcommittee Chairman Robert Kastenmeier (D-Wis.) noted that the legislation 'tried to remain neutral' in its treatment of dish owners. He explained that the subcommittee did not want the bill to become a vehicle for deciding the policy on 'what dish owners can receive'."

[22] H.R. Report No. 99-647, 99th Cong., 2d Sess. 43-44 (1986).

[23] 47 U.S.C. § 705(a).

[24] Ibid., § 705(b).

[25] Electronic Communicaitons Privacy Act, § 2511(1)(d), (4).

[26] Ibid., § 2520(a),(b),(c).

[27] Ibid., § 2510(16)(A). It is also considered not readily accessible if it is transmitted using modulation techniques whose essential parameters have been withheld from the public to ensure privacy, transmitted on certain radio subcarrier frequencies, transmitted by a common carrier, or transmitted as part of a private microwave, satellite, or broadcast auxiliary service.

[28] Arthur R. Miller and Michael H. David, Intellectual Property (St. Paul, Minn.: West Publishing Co. 1983), pp. 289-301; Peter D. Rosenberg, Patent Law Fundamentals (New York: Clark Boardman Co. 1975), pp.70-73.

[29] In addition to copyright and patent, trademark, service mark, and the right of pulbicity explicitly protect intangible intellectual interests. The personal rights doctrines of unfair competition, privacy, prima facie tort, libel, disparagement, misnppropriation, and moral rights have also served as a way of protecting intangible intellectual interests. Todd F. Simon,

"Right of Publicity Reified: Fame as Business Asset," New York Law School Law Review, 30, 707-746 (1985).

[30]Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Harper & Row v. Nation Enterprises, 105 S. Ct. 2218 (1985).

[31]17 U.S.C. §§ 501-510 (1978)(copyright); 35 U.S.C. § 271-286 (1982)(patent); 15 U.S.C. §1125 (1982)(trademark).

[32]Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931).

[33]17 U.S.C. §§ 101-105; Final Report of the National Commission on New Technological Uses of Copyrighted Works (Washington, D.C.: Library of Congress 1979), pp. 9-46.

[34]Golden Triangle Broadcasting, Inc. v. City of Pittsburgh, 483 Pa. Commw. 525, 397 A.2d 1147 (1979)(manufacturing exemption in sales tax statute not applied to manufacture of electromagnetic energy due to intangibility).

[35]Alan R. Glasser,"Video Voodoo: Copyright in Video Game Computer Programs," Federal Communications Law Journal, 38, 103, 113-120 (1986); Zacchini v. Scripps-Howard Broadcasting, Inc., 433 U.S. 562, 575-577 (1977).

[36]Black's Law Dictionary (St. Paul, Minn.: West Publishing Co. 1968), 1487. That a right is "in rem"--based on property--or "in personam"--based on the individual, makes little difference in terms of effective legal protection.

[37]California Satellite Systems v. Seimon, 767 F.2d 1364 (9th Cir. 1985) (action by broadcaster to enforce exclusivity rights under Communications Act of 1934).

[38]Simon, Right of Publicity, 700-701; Black's Law Dictionary, 1457.

[39]A network is simply a group of connected stations that has access to common programming. In practice, however, the network-affiliate relationship has developed so that network-generated programming is the primary material of the affiliate. Douglas H. Ginsburg, Regulation of Broadcasting (St. Paul, Minn.: West Pub. Co. 1979), 244-247. Typically the network determines the program material and times of broadcast for the material. Syndication, by contrast, is a less restraining contractual agreement between a program provider and a broadcast station that grants the station access to and use of material generated via the syndicator. Broadcast times and actual use are normally determined by the station. Besen, Manning and Mitchell, "Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem," Journal of Law and Economics, 21, 67-77 (1978).

[40]Electronic Communications Privacy Act, § 2511(4)(c); H.R. Report No. 99-647, 99th Cong., 2d Sess. 37 (1986).

[41]Electronic Communications Privacy Act, § 2512. The drafters found it necessary to declare prohibited the sale or making of "any electornic, mechanical, or other device..." capable of intercepting signals, clearly anticipating rapid development of technology that aids in theft of signals.

[42]Douglas G. Baird, "Common Law Intellectual Property and the Legacy of International News Service v. Associated Press," The University of Chicago Law Review, 30, 411 (1983); Paul Sullivan, "News Piracy: Unfair Competition and the Misappropriation Doctrine," Journalism Monographs, No. 56 (1978), 9-18.

[43]248 U.S. 215 (1918).

[44]Ibid., 239-240.

[45]Ibid., 240-242.

[46]Veatch v. Wagner, 116 F. Supp. 904, 906 (D.C. Alaska 1953). The court recognizes the value of a newspaper's reports that were used by a local radio station, but in computing damages determined that the newspaper was unable to specify actual money damage, and awarded nominal damages.

[47]Jerome Gilson, Trademark Protection and Practice (New York: Matthew Bender & Co. 1982), pp. 3-17 to 3-39.

[48]Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183 (E.D.N.Y. 1972) (First Amendment does not immunize defendant's use of close imitation of plaintiff's trademark despite use on altogether different product).

[49]Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938) (after three decades and $17 million in promotion, plaintiff's trade name "Shredded Wheat" had no special meaning to buyers so as to justify legal protection).

[50]17 U.S.C. § 101.

[51] Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984).

[52] International News Service, 222; Sullivan, News Piracy, 6-8.

[53] 17 U.S.C. § 227 (1982); Miller, Intellectual Property, 306-308.

[54] 17 U.S.C. § 101. Tangibility is tied to the notion of a work being "fixed," that is, "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." SNG signals would likely never be considered "fixed" in this sense.

[55] Glasser, Video Voodoo, 120-126.

[56] See e.g., Midway Manufacturing Co. v. Dirkschneider, 543 F. Supp. 466 (D. Neb. 1981); Midway Manufacturing Co. v. Artic International, Inc., 547 F. Supp. 999 (N.D.Ill. 1982), aff'd, 704 F.2d 1009 (7th Cir. 1983).

[57] Thomas I. Emerson, "The Affirmative Side of the First Amendment, Georgia Law Review," 15, 795 (1981).

[58] Mazer v. Stein, 347 U.S. 201. 219 (1954).

[59] Electronic Communications Privacy Act, §§ 2515-2519, 2701-2710, 3117-3126.

[60] Ibid., §§ 2510(16), 2511(4)(c).

[61] 17 U.S.C. §§ 501-510 (copyright); 35 U.S.C. 271-186 (patent); 15 U.S.C. §1125 (trademark).

[62] Electronic Communications Privacy Act, § 2511(4)(a),(b).

[63]Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968)(film of assassination of President Kennedy subject to fair use copyright defense due to high public interest in film); Jan LeBlanc-Wicks, "Free Speech v. Free Enterprise: The Public Policy Clash Between the First Amendment and the Right of Publicity," paper presented to the Law Division of AEJMC, August 1986, pp. 16-25 (1986).

[64]17 U.S.C. § 107.

[65]Harper & Row v. Nation Enterprises, 105 S. Ct. 2218 (1985); WXIA-TV v. Duncan, 572 F. Supp. 1186 (N.D.Ga. 1983).

[66]H.R. Report No. 99-647, 99th Cong., 2d Sess. 44-45, 47 (1986).

[67]FCC v. League of Women Voters of California, 104 S. Ct. 3106 (1984)(public's interest in diversity of ideas overrides Congressional desire to limit ability of public broadcasters to editorialize).

[68]In unfair competition, the harm is in emulating a competitor to the extent that goods are "passed off" to consumers as if they were the product of an originator. Gilson, Trademark Protection, 7-23 to 7-27; Toho Co., Ltd. v. Sears, Roebuck & Co., 645 F.2d 788 (9th Ci. 1981)(deception of consumers, not intent to deceive, determinative in trademark case).

[69]See,e.g., Colligan v. Activities Club of New York, Ltd., 442 F.2d 686 (2d Cir. 1971)(no right of action for members of the general public).

[70]Electronic Communications Privacy Act, §§ 2511(1),(4).

[71]H.R. Report No. 99-647, 99th Cong., 2d Sess., 48 (1986).

[72]Movie Systems, Inc. v. Heller, 710 F.2d 492 (8th Cir. 1983).

[73]See, e.g., 17 U.S.C. § 504(b)(actual damages plus infringer's profits in copyright action). A willful infringement may result in exemplary damages of from $250 to $10,000. 17 U.S.C. § 504(c).

[74]Injunctions are traditionally used to "freeze" the relative positions of the parties, and require a preliminary showing by plaintiff that it will prevail at trial. Gilson, Trademark Protection, pp. 8-56.21 to 8-66. It is futile to "freeze" SNG feeds, which are transmitted and received, occasionally used, almost simultaneously. On the other hand, originators will not likely be able to prove that future interceptions will be harmful with the specificity required in obtaining an injunciton. Ibid., 8-57 to 8-58.

[75]Rosenberg, Patent Law, 292-294.

[76]Normally, higher damage awards, termed "exemplary" or "punitive," require a showing of aggravated wrongful behavior by a defendant. Black's Law Dictionary, 467-469; Milton D. Green, Basic Civil Procedure (Mineola, N.Y.: Foundation Press 1972), pp. 188-189.

[77]Charles R. McManis, The Law of Unfair Trade Practices (St. Paul, Minn.: West Publishing Co. 1983), pp. 342, 369, 384.

[78]15 U.S.C. § 78j(b); SEC v. Texas Gulf Sulphur Co. 401 F.2d 833 (2d Cir. 1968)(en banc), cert. denied, 394 U.S. 976 (1969). It is worth noting that exemplary damages are also available in trademark and patent litigation, although they are not so termed. 15 U.S.C. § 1117 (trademark); 35 U.S.C. § 284 (patent). Each, however, is based on egregious defendant behavior, not on the difficulty of apprehension of infringers.

[79]17 U.S.C. § 504(c)(2); Gilson, Trademark Protection, 8-86.

[80]Hoffman, "The Right of Publicity--Heirs' Right, Advertisers' Windfall, or Courts' Nightmare?," DePaul Law Review, 31, 2 (1981).

[81]U.S. Const. art I, sec. 8; Laurence H. Tribe, American Constitutional Law (Mineola, N.Y.: Foundation Press 1978), pp. 232-243.